Chapter III

SCOPE AND METHOD OF INITIAL INQUIRY AND INITIAL REPORT

A. Scope and Method of Initial Inquiry

Business and Professions Code section 2220.1 mandates a broad scope for the Monitor's project as a whole. The mission of the two-year project is to analyze the enforcement and diversion programs of the Medical Board of California and to assist with efforts to improve the overall performance of those programs. The two-year project, which began in late October 2003, requires the submission of an initial report on November 1, 2004; this report will be the subject of a public hearing by the Joint Committee on Boards, Commissions and Consumer Protection, and will generate "sunset" legislation and other recommendations for administrative change during 2005. During the second year of the project, the Monitor will assist with the Board's sunset legislation, monitor the Board's progress in implementing any recommended administrative changes, continue to monitor the Board's enforcement and diversion programs, and publish a final report on November 1, 2005 — at which time the Enforcement Monitor project is scheduled to officially conclude.

Because of the timing of the Board's sunset hearing and the potential for reform legislation during 2005, the Monitor has attempted to study, evaluate, and discuss the most significant components of both programs in this initial report, so that responsive legislation relevant to these components might be introduced in 2005. However, and as discussed in Chapter XVII and elsewhere, we were unable to look in detail at several components of the enforcement program during the first year of the project; those will be the subject of examination during second year and in-depth reporting on November 1, 2005.

Generally, our initial inquiry has included five principal components:

(1) **Review and analysis of the extensive existing literature** relevant to the Medical Board's enforcement and diversion programs, including sixteen independent studies of MBC; two major reports on the California Legislature's enactment of AB 1 (Keene) in 1975; two "sunset review" reports prepared by MBC; and two lengthy reports by the Joint Legislative Sunset Review

Committee on MBC. A list of these reports is attached as Appendix B. In addition, the Monitor and staff reviewed numerous investigation files and read MBC disciplinary decisions and court rulings reviewing those decisions. A full description of the methodology utilized in examining the Diversion Program is included in Chapter XV.

(2) **Review and analysis of all relevant MBC-generated internal and public documents** which address policy, procedure, and training issues, including MBC's *Enforcement Operations Manual* and eighteen other policy and procedure manuals utilized by the enforcement and diversion programs. In addition, we reviewed MBC-generated annual reports and "agenda packets" for its quarterly meetings dating back to the early 1990s, MBC's 2002 Strategic Plan, and MBC-generated "Performance Measurement Indicator Reports" prepared since the adoption of its 2002 Strategic Plan. A list of these materials is attached as Appendix C.

(3) **Interviews of 92 persons** (some on multiple occasions) with expertise concerning MBC's enforcement and/or diversion programs, including:

- Former Department of Consumer Affairs Director Kathleen Hamilton, current Department of Consumer Affairs Director Charlene Zettel, and members of the executive staff of the Department of Consumer Affairs;

- Staffs of the committees of the state Legislature charged with oversight of MBC, including Bill Gage, Ed Howard, and Jay Greenwood;

- MBC Executive Director Dave Thornton, Deputy Executive Director Joyce Hadnot, and Enforcement Chief Joan Jerzak;

- Senior MBC enforcement program managers, supervisors, and advisors;

- MBC enforcement staff representing almost every job classification involved in the enforcement program, including investigators, staff services analysts, medical consultants (both current and former), supervisors, and many others who work both at the Board's headquarters in Sacramento and at MBC's twelve district offices throughout the state;

- Senior Assistant Attorney General Carlos Ramirez, Chief of the Health Quality Enforcement (HQE) Section within the Attorney General's Office; five of HQE's six Supervising Deputies Attorney General; and numerous deputies attorney general who plead and try disciplinary matters on behalf of the Medical Board;

- Members of the Liaison Committee to the Diversion Program;
- Local prosecutors from five district attorney's offices statewide, as well as state regulators who interact with MBC's enforcement program;
- Consumers, consumer-victims, and consumer groups, including representatives of the alternative medicine community;
- Medical profession representatives; and
- Private sector attorneys, including members of the defense bar who regularly represent physicians in Medical Board enforcement proceedings.

In addition to formal interviews, the Monitor met on about two dozen occasions with legislative and executive branch personnel; Medical Board members, staff, and legal counsel; and Department of Consumer Affairs personnel on issues related to the Enforcement Monitor project. Finally, the Monitor received and responded to approximately 25 letters from physicians, defense counsel, and consumers who have participated in MBC enforcement proceedings, and examined some of the case files relevant to those inquiries.

(4) **Statistical data compilation and analysis**, especially in conjunction with Ben Frank, Director of the NewPoint Group, who has supervised the compilation and analysis of key performance statistics for the project as a whole; and

(5) **Legal research**, including statutes, regulations, and case law from California and other states.

We present two *caveats* about the data presented in this report. The first concerns the scope of the data. The Medical Board's enforcement program serves not only the Medical Board, but also several of the so-called "allied health licensing programs" (AHLPs). In past years, eight AHLPs — which regulate non-physician health care practitioners — were statutorily part of the Medical Board, subject to its jurisdiction, and utilized its enforcement program. Recently, many of the AHLPs have successfully sought legislation separating themselves from the jurisdiction of MBC; however, some of them still contract for the use of components of MBC's enforcement program to varying degrees. For example, the Board of Podiatric Medicine utilizes the Medical Board's Central Complaint Unit to receive and screen complaints, MBC's investigators to perform field investigations, the Health Quality Enforcement Section to prosecute cases, and the Medical Quality Hearing Panel to hear its disciplinary matters. At the other end of the spectrum, neither the Respiratory Care Board nor the Physical Therapy Board uses CCU or MBC's investigators, while they both use HQE. In addition,

the Medical Board directly regulates some non-physician health care professions, including registered dispensing opticians; as such, its enforcement program handles complaints against those licensees. Although MBC serves these other agencies, the thrust of SB 1950 (Figueroa) and the Enforcement Monitor statute reveals the Legislature's intent to strengthen MBC's *physician* discipline program. As such, for the most part, the data presented in this report focus on MBC's handling of cases against physicians. We have generally excluded AHLP enforcement data — which (in any event) constitute only a small proportion of overall MBC enforcement program workload.

A second caveat about the data presented in this report involves the presence of minor differences between some of the statistics shown in this report and comparable statistics that have been published by MBC and/or the Department of Consumer Affairs. In order to properly complete analyses of all of the issues and areas of concerns that are included in our scope of work, a number of special compilations of MBC complaint tracking system statistical data were prepared for us by MBC staff. In most cases, these special compilations were prepared within a few weeks of MBC's compilation of comparable statistical data for MBC's and DCA's published reports. However, MBC's complaint tracking system is dynamic in the sense that it is continuously updated to reflect the status of every individual complaint. Sometimes, after being closed, a complaint or investigation may be reopened. Also, reopened complaints and investigations will, at some point, be re-closed. These types of changes can marginally impact the results of various statistical compilations that are produced from the complaint tracking system at slightly different points in time, including tabulations of the number of complaints closed and referred to investigation by CCU, and tabulations of the number of investigation closures and referrals for disciplinary action. Except where otherwise noted in this report, minor differences between the statistics shown in this report and comparable statistics published by MBC and/or DCA are attributable to legitimate changes that were made to complaint tracking system data between the dates when the statistical data used in the different reports were compiled.

B. Scope of the Initial Report

In Chapter IV of this initial report, we present a chronology of the evolution of the Medical Board's enforcement program, focusing on the purpose of its creation and the extent to which that purpose has been achieved. The chronology discusses five major legislative enactments that have shaped MBC's enforcement program throughout the past thirty years.

In each succeeding chapter, the report proceeds to discuss, in chronological order as the process actually unfolds, the various components of the Medical Board's enforcement program. Each chapter contains a narrative description of the functioning of the unit or component, the Monitor's initial concerns with the functioning of that unit or component, and the Monitor's initial recommendations to address those concerns. Some components — such as the functioning of the

Central Complaint Unit, the Board's investigative field offices, prosecutions by the Health Quality Enforcement Section of the Attorney General's Office, and the Diversion Program — are comprehensively addressed in this initial report. Because of the time it took to fully research and develop those steps in the process, other components — such as the conduct of evidentiary hearings by the Medical Quality Hearing Panel within the Office of Administrative Proceedings, the Board's Probation Unit, and its Citation and Fine Unit — have not been comprehensively addressed in this initial report, and will be the subject of in-depth research during 2005 and coverage in the Monitor's final report on November 1, 2005.

In this report, the Monitor makes findings and recommendations that are addressable on a number of levels — internal administrative or procedural change, regulatory amendment, legislative change, budget and staffing enhancements, and/or structural change. Some of these recommendations are concrete, complete, and ready for consideration by the Board. Others are less fully developed concepts whose merits and precise implementation will be the subject of discussion between the Monitor and all interested stakeholders during 2005. Finally, others urge the Medical Board to engage in a constructive public dialogue on certain issues, having been fully informed by the discussion contained and data revealed in this report.